

**AGRICULTURAL LABOR RELATIONS BOARD
CASE DIGEST SUPPLEMENT
VOLUME 28 (2002)**

- 202.06 Alleged custom harvester's contract with grower providing compensation based only on wages for harvest labor plus a percentage override, and no separate compensation for hauling and day-to-day control of harvesting or other specialized services not typical of farm labor contractor, fails to raise issue of fact that alleged custom harvester is more than a farm labor contractor. Day-to-day control was not shown to be critical, and no evidence provided of any highly specialized or costly machinery.
[VENTURA COASTAL CORPORATION, 28 ALRB No. 6](#)
- 202.07 Compensation in form of percentage override based on wages provided in contract is still a fee for a farm labor contractor under the definitions of Labor Code section 1682. Labor provider alleged to be custom harvester is therefore a farm labor contractor, and therefore excluded from status of an agricultural employer by Labor Code section 1140.4(c).
[VENTURA COASTAL CORPORATION, 28 ALRB No. 6](#)
- 202.07 Responsibility for hiring, supervising, and firing employees and paying them wages specified in contract with grower typical of farm labor contractor function and does not make farm labor contractor a custom harvester or agricultural employer.
[VENTURA COASTAL CORPORATION, 28 ALRB No. 6](#)
- 204.01 Employee found to be as supervisor based on the following: 1) credited testimony reflecting that the employee had hired employees or at least effectively recommended such actions and had granted requests for time off, 2) the employee's declaration at the time of the election in which he stated that he supervised employees and could recommend hiring and firing, 3) the Employer's admission that at the time the employee was hired it was intended that he would be a supervisor and this was announced to the other employees, 4) the Employer's admission that neither the other employees nor the employee in question was informed that he would not be a supervisor as planned, 5) the employee's listing on payroll records as a "foreman" at the time of the election, and 6) the employee's salary, which was \$500 dollars per month more than the next highest paid employee.
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 5](#)

- 204.04 Employee found to be a supervisor where, in addition to secondary indicia of supervisory status, credited testimony reflected that he had hired employees or at least effectively recommended such actions and had granted requests for time off.
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 5](#)
- 204.11 Employee found to be a supervisor where, in addition to other secondary indicia of supervisory status and credited testimony reflecting that he had hired employees or at least effectively recommended such actions and had granted requests for time off, he was paid \$500 per month than the next highest paid employee.
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 5](#)
- 312.01 There is no requirement that those who support the union or vote for the union in an election be members of the union in any capacity or for any length of time.
[PETE VANDERHAM DAIRY, INC., 28 ALRB No. 1](#)
- 312.05 Children of the employer, even if long-term employees, are ineligible to vote pursuant to the exclusion contained in subdivision (b)(5) of Regulation 20352.
[PETE VANDERHAM DAIRY, INC., 28 ALRB No. 1](#)
- 317.11 A claim of intimidation requires more than an expression of fear that an employee's vote will be ascertainable from the public tally of the ballots where the number of eligible voters is very small. There must be facts provided in the election objections petition, supported by declarations, to indicate any actions by Union supporters or agents that would constitute intimidation or coercion.
[PETE VANDERHAM DAIRY, INC., 28 ALRB No. 1](#)
- 322.01 Petition naming a second corporate entity as an "aka" of corporate entity named first in petition as employer not defective as to the second entity, even accepting that first named corporate entity has no employees at site where eligible voters employed.
[VENTURA COASTAL CORPORATION, 28 ALRB No. 6](#)

- 324.02 Board affirmed dismissal of election objections that consisted of bare allegations unaccompanied by supporting declarations. The Board's regulations unequivocally require that adequate declarations be timely filed with the objections petition. The regulations further prohibit any exceptions to this rule, and there is no precedent for these requirements being excused by the Board.
[DESERT SPRING GROWERS, ARZ, INC. dba SUN CITY GROWERS, 28 ALRB No. 9](#)
- 325.04 Regulation 20363, subdivision (b) (Tit. 8, Cal. Code Regs., sec. 20363, subdiv. (b)), requires that a party filing exceptions to a challenged ballot report include declarations or other documentary evidence in support of the exceptions. Where such evidence raises material issues of fact as to the findings relied on by the Regional Director in the challenged ballot report, the Board will set the matter for an evidentiary hearing to resolve the disputed facts. (See, e.g., *Oceanview Produce Company* (1994) 20 ALRB No. 10.)
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 2](#)
- 325.04 There is no requirement that the evidence submitted in support of the exceptions must be restricted to that which the filing party previously provided to the Regional Director during the investigation, and the Board has accepted such “new” evidence in support of exceptions. (*Kern Valley Farms* (1977) 3 ALRB No. 4.)
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 2](#)
- 325.04 In evaluating declarations offered in support of exceptions to a challenged ballot report, the Board is not concerned with the plausibility of the factual scenario presented in the declarations. Rather, under the established standard for setting a hearing in these matters, it is simply a question of whether the declarations place in dispute facts material to the Regional Director’s determination of the challenge.
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 2](#)
- 325.05 Regulation 20363, subdivision (b) (Tit. 8, Cal. Code Regs., sec. 20363, subdiv. (b)), requires that a party filing exceptions to a challenged ballot report include declarations or other documentary evidence in support of the exceptions. Where such evidence raises material issues of fact as to the findings relied on by the Regional Director in the challenged ballot report, the Board will set the matter for an evidentiary hearing to resolve the disputed facts. (See, e.g., *Oceanview Produce Company* (1994) 20 ALRB No. 10.)
[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 2](#)

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[ALBERT GOYENETCHE DAIRY, 28 ALRB No. 2](#)
- 325.05 Where declarations and exhibits fail to present facts that would support assertion of custom harvester status, no material issue of fact requiring hearing has been raised.
[VENTURA COASTAL CORPORATION, 28 ALRB No. 6](#)
- 414.01 A dual motive analysis under *Wright Line* (1980) 251 NLRB 1083 is not necessary in circumstances where the conduct for which the employer claims to have discharged the employee remains protected.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)
- 414.01 Where an employer provokes an employee to the point where the employee commits an indiscretion or insubordinate act, and the employer's provocation consists of unlawful conduct or is motivated by the employee's protected activity, the employer cannot rely on the employee's indiscretion to meet its burden of showing that it would have discharged the employee even in the absence of protected activity.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 414.01 The discharge of an employee who reactively grabbed and lowered his supervisor's hand from his face after the supervisor threw mushrooms at him, yelled at him and pointed his finger at his face violated section 1153 (a) and (c) as the employee's brief physical contact with the supervisor was in line with the supervisor's provocative conduct, and as such, the employer could not rely on the employee's indiscretion in disciplining him.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 414.03 In an alternative analysis, the Board found that even if an employee's swearing at his supervisor had caused him to lose the Act's protection, the employer failed to meet its burden of proving that it would have discharged the employee even in the absence of his protected concerted activity.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)

- 414.03 In an alternative analysis, the Board held that even if the provocation doctrine did not preclude the employer from presenting its defense under *Wright Line*, the Board would have concluded that the employer had not met its burden of showing it would have discharged the employee even in the absence of his union and other protected concerted activities.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 414.03 Where an employer provokes an employee to the point where the employee commits an indiscretion or insubordinate act, and the employer's provocation consists of unlawful conduct or is motivated by the employee's protected activity, the employer cannot rely on the employee's indiscretion to meet its burden of showing that it would have discharged the employee even in the absence of protected activity.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 414.03 Employer failed to meet its burden of proof to show it would not have rehired worker even in the absence of her protected concerted activity when its primary defense, that the worker had failed to apply for work when it was available, was found to be factually incorrect.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 414.03 General Counsel failed to establish a prima facie case that worker's protected concerted activity was a motivating factor in the decision to discharge her. Worker's discharge was remote in time from the protected concerted activity, and there was no evidence presented that the employer had targeted the worker for her role in earlier group protests.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 414.03 Employer carried its burden of showing it would have failed to rehire employee even in the absence of his protected concerted activity when it established that the employee's unsatisfactory work performance was the reason he was not rehired.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 414.04 Employer violated 1153(a) of the Act by refusing to rehire worker who led group complaints about abusive treatment by a forewoman and about wages.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)

- 414.04 Although an employee's protected concerted activity occurred several months before the employer failed to rehire her, a prima facie case of discriminatory failure to rehire was established because the record showed continuing animus when the employer's labor contractor specifically told the supervisor in charge of the seasonal recall not to rehire the worker because she had been a troublemaker.
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- 414.04 Employer violated section 1153(a) by discharging an employee who protested the manner in which a supervisor treated a co-worker while giving the co-worker a work assignment when the concerted activity motivated the supervisor's later provocation of the employee into making brief physical contact with the supervisor.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 414.04 Discharge of an employee who used an obscene term towards his supervisor in the course of an otherwise protected discussion violated section 1153(a) of the Act. The employee's conduct did not seriously undermine the employer's ability to maintain control in the work place, was unaccompanied by threats or violence, was provoked in part by employer conduct that was arguably an unfair labor practice, and in light of all surrounding circumstances did not rise to the level of egregious behavior that would cause him to lose the Act's protection.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)

- 415.06 Discharge of a supervisor did not violate the Act where there was no evidence presented that showed his discharge had an adverse effect on any other employee or that any other employee's work was dependent on his continued employment.
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- 415.06 Employer carried its burden of showing it would have failed to rehire employee even in the absence of his protected concerted activity when it established that the employee's unsatisfactory work performance was the reason he was not rehired.
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[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 420.01 The discharge of an employee who reactively grabbed and lowered his supervisor's hand from his face after the supervisor threw mushrooms at him, yelled at him and pointed his finger at his face violated section 1153 (a) and (c) as the employee's brief physical contact with the supervisor was in line with the supervisor's provocative conduct, and as such, the employer could not rely on the employee's indiscretion in disciplining him.
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[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)

- 420.06 The throwing of objects at the vehicle occupied by a company official constitutes serious strike misconduct. It is not necessary that the objects caused any damage, as the conduct itself is highly coercive.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.06 Leader and instigator of a group of strikers who threw boxes at vehicle occupied by company official, blocked the vehicle's exit, and rocked the vehicle from side to side was engaged in serious strike misconduct for which he was lawfully discharged.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.06 Striker who approached employee in order to take his box so he could not continue working, but who stopped and backed away when told to do so by others, was found to have engaged in no more than an aborted attempt to interfere with work that did not constitute serious strike misconduct.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.06 Actions that promote or encourage misconduct by other strikers may justify discharge.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.06 Where, in light of the surrounding circumstances, a statement reasonably would be construed as threatening violence or other unlawful strike activity, the statement may constitute serious strike misconduct warranting discharge. Threats by the leader of a group of strikers that they would destroy or "break" the company, occurring before and just after litany of violent and other unprotected conduct by the group, and carrying implied threat of continuance of similar activity, warranted discharge.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.07 Striker who destroyed crates of packed berries engaged in serious strike misconduct warranting discharge.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.08 General Counsel failed to establish a prima facie case that worker's protected concerted activity was a motivating factor in the decision to discharge her. Worker's discharge was remote in time from the protected concerted activity, and there was no evidence presented that the employer had targeted the worker for her role in earlier group protests.
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- 420.08 Discharge of a supervisor did not violate the Act where there was no evidence presented that showed his discharge had an adverse effect on any other employee or that any other employee's work was dependent on his continued employment.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 420.09 Employer violated section 1153(a) by discharging an employee who protested the manner in which a supervisor treated a co-worker while giving the co-worker a work assignment when the concerted activity motivated the supervisor's later provocation of the employee into making brief physical contact with the supervisor.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 420.12 Where an employer provokes an employee to the point where the employee commits an indiscretion or insubordinate act, and the employer's provocation consists of unlawful conduct or is motivated by the employee's protected activity, the employer cannot rely on the employee's indiscretion to meet its burden of showing that it would have discharged the employee even in the absence of protected activity.
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- 420.12 Discharge of an employee who used an obscene term towards his supervisor in the course of an otherwise protected discussion violated section 1153(a) of the Act. The employee's conduct did not seriously undermine the employer's ability to maintain control in the work place, was unaccompanied by threats or violence, was provoked in part by employer conduct that was arguably an unfair labor practice, and in light of all surrounding circumstances did not rise to the level of egregious behavior that would cause him to lose the Act's protection.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)
- 420.15 Employer carried its burden of showing it would have failed to rehire employee even in the absence of his protected concerted activity when it established that the employee's unsatisfactory work performance was the reason he was not rehired.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)

- 420.19 Discharge of an employee who used an obscene term towards his supervisor in the course of an otherwise protected discussion violated section 1153(a) of the Act. The employee's conduct did not seriously undermine the employer's ability to maintain control in the work place, was unaccompanied by threats or violence, was provoked in part by employer conduct that was arguably an unfair labor practice, and in light of all surrounding circumstances did not rise to the level of egregious behavior that would cause him to lose the Act's protection.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)
- 420.19 The Board reiterated that the proper test for determining whether an employee's use of vulgar language during an otherwise protected discussion with a supervisor caused the employee to lose the protection of the Act is the four-part balancing test set forth in *Atlantic Steel Co.* (1979) 245 NLRB 814.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)
- 420.24 The proper standard for evaluating serious strike misconduct is that enunciated in *Clear Pine Mouldings, Inc.* (1984) 268 NLRB 1044. Under the *Clear Pine Mouldings, Inc.* standard, a striker may be found to have engaged in serious strike misconduct, thus causing the striker to lose the protection of the Act if his or her conduct in the course of the strike “may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” Abusive threats need not be accompanied by violence or physical acts or gestures.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.24 While serious strike misconduct may consist solely of verbal threats unaccompanied by any physical element, yelling insults at non-striking employees and imploring them to stop working does not constitute such misconduct.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 420.24 Where, in light of the surrounding circumstances, a statement reasonably would be construed as threatening violence or other unlawful strike activity, the statement may constitute serious strike misconduct warranting discharge. Threats by the leader of a group of strikers that they would destroy or “break” the company, occurring before and just after litany of violent and other unprotected conduct by the group, and carrying implied threat of continuance of similar activity, warranted discharge.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)

- 420.27 Employer failed to meet its burden of proof to show it would not have rehired worker even in the absence of her protected concerted activity when its primary defense, that the worker had failed to apply for work when it was available, was found to be factually incorrect.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 421.01 Employee handbook that discouraged employees from seeking redress through the union and actively encouraged direct dealing with employer, employer's refusal to recognize union-designated employee representatives, employer's predisposition to blame union supporters in disputed cases of misconduct, and employer's cursory treatment of anti-union employees who made serious threats to union supporters all indicate that the employer's motivation for discharging an employee was his union activity.
[PICTSWEET MUSHROOM FARMS, 28 ALRB No. 4](#)
- 423.01 A conversation between an individual employee and a supervisor that was held on the day following a group protest of schedule changes and work policies was a logical outgrowth of group action, and was therefore a continuation of the previous day's protected concerted activity.
[THE ELMORE COMPANY, 28 ALRB No. 3](#)
- 423.01 Employee who protested the manner in which a supervisor treated a co-worker while giving the co-worker a work assignment was engaged in protected concerted activity.
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- 423.01 Where, in light of the surrounding circumstances, a statement reasonably would be construed as threatening violence or other unlawful strike activity, the statement may constitute serious strike misconduct warranting discharge. Threats by the leader of a group of strikers that they would destroy or "break" the company, occurring before and just after litany of violent and other unprotected conduct by the group, and carrying implied threat of continuance of similar activity, warranted discharge.
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- 423.01 Actions that promote or encourage misconduct by other strikers may justify discharge.
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- 423.01 Striker who approached employee in order to take his box so he could not continue working, but who stopped and backed away when told to do so by others, was found to have engaged in no more than an aborted attempt to interfere with work that did not constitute serious strike misconduct.
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[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 423.01 An employer's determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct. It is insufficient to conclude that much of the conduct of the group of which the striker was a part was unprotected.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
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- 423.04 A conversation between an individual employee and a supervisor that was held on the day following a group protest of schedule changes and work policies was a logical outgrowth of group action, and was therefore a continuation of the previous day's protected concerted activity.
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- 423.07 Employer violated 1153(a) of the Act by refusing to rehire worker who led group complaints about abusive treatment by a forewoman and about wages.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)

- 423.09 Discharge of an employee who used an obscene term towards his supervisor in the course of an otherwise protected discussion violated section 1153(a) of the Act. The employee's conduct did not seriously undermine the employer's ability to maintain control in the work place, was unaccompanied by threats or violence, was provoked in part by employer conduct that was arguably an unfair labor practice, and in light of all surrounding circumstances did not rise to the level of egregious behavior that would cause him to lose the Act's protection.
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[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 423.09 The proper standard for evaluating serious strike misconduct is that enunciated in *Clear Pine Mouldings, Inc.* (1984) 268 NLRB 1044. Under the *Clear Pine Mouldings, Inc.* standard, a striker may be found to have engaged in serious strike misconduct, thus causing the striker to lose the protection of the Act if his or her conduct in the course of the strike “may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” Abusive threats need not be accompanied by violence or physical acts or gestures.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 424.04 The proper standard for evaluating serious strike misconduct is that enunciated in *Clear Pine Mouldings, Inc.* (1984) 268 NLRB 1044. Under the *Clear Pine Mouldings, Inc.* standard, a striker may be found to have engaged in serious strike misconduct, thus causing the striker to lose the protection of the Act if his or her conduct in the course of the strike “may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.”
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)

451. 01 Allegation that employee's layoff violated the Act was time-barred. Surrounding circumstances were sufficient to put employee on notice that an adverse action had taken place; therefore, the time period for filing the charge commenced on the day of the layoff.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 451.01 The Board found that an allegation concerning employer's refusal to rehire the employee was timely filed when the employer failed to adequately establish that the employee had clear unequivocal knowledge that he was not going to be rehired more than six months before the charge was filed.
[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
451. 03 Allegation that employee's layoff violated the Act was time-barred. Surrounding circumstances were sufficient to put employee on notice that an adverse action had taken place; therefore, the time period for filing the charge commenced on the day of the layoff.
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[McCAFFREY GOLDER ROSES, 28 ALRB No. 8](#)
- 456.01 Motion seeking issue preclusion or reopening of record due to General Counsel's failure to produce exculpatory declarations from related election cases denied for lack of prejudice where claims that declarations were exculpatory either were without merit or Board's decision rendered them moot.
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)
- 460.02 The proper standard for evaluating serious strike misconduct is that enunciated in *Clear Pine Mouldings, Inc.* (1984) 268 NLRB 1044. Under the *Clear Pine Mouldings, Inc.* standard, a striker may be found to have engaged in serious strike misconduct, thus causing the striker to lose the protection of the Act if his or her conduct in the course of the strike "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."
[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)

460.02 An employer's determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct. It is insufficient to conclude that much of the conduct of the group of which the striker was a part was unprotected.

[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)

460.02 To justify a discharge, the employer may not rely on strike misconduct that was not the basis for the discharge, but such conduct may be a basis for denying reinstatement and limiting back pay.

[COASTAL BERRY COMPANY, LLC, 28 ALRB No. 7](#)